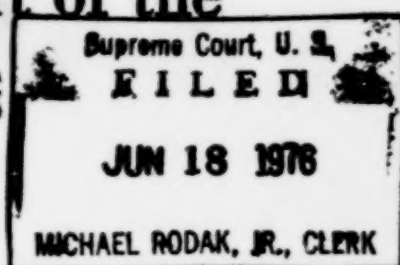

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1258



WILLIAM BLACKIE, et al.,

Petitioners,

v.

LEONARD BARRACK, et al.,

Respondents.

Supplemental Brief of Petitioners Blackie, et al.

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Supplemental Brief of Petitioners Blackie, et al.

Petitioners respectfully submit this supplemental brief concerning the effect of the agreement for partial settlement which was entered into after their petition for certiorari was filed, and referred to in briefing before this Court by respondents in their opposition brief.

I. The Petitions Are Not Now Moot and May Never Become Moot by Reason of the Proposed Partial Settlement Agreement.

Respondents argue in their opposition (pp. 3-4) that the proposed partial settlement will render the petitions for certiorari moot on judicial approval of the proposed partial settlement. This statement is incomplete and fails to provide the Court with full and fair advice concerning the pertinent provisions of the agreement respecting the pending petitions for certiorari, as explicitly required by the agreement (Appendices A and B).

The agreement for the proposed partial settlement does not moot the petitions for certiorari because: (1) the proposed partial settlement might be disapproved by the District Court, in which case it would become null and void (Appendix C), (2) the proposed settlement can by its terms be terminated by the settling defendants if aggregate opt-out losses exceed a specified amount (Appendix D), and (3) the proposed settlement agreement might also be terminated by plaintiffs depending upon the insurer's performance (Appendix E).

Therefore, questions on the petitions for certiorari concerning the propriety of the class may never become moot by reason of the proposed settlement agreement, and certainly are not moot now.

In view of the uncertainties of final approval of a consummated settlement as proposed, the agreement specifically provides in paragraph 3, set forth in Appendix A hereto, that if, prior to the effective date, which is the date of determination of, or expiration of time for, appeal from final approval of the proposed settlement by the District Court (Appendix B), the Supreme Court shall have acted on the petitions in any manner requiring revision or amendment of the proposed settlement, then such changes therein as are required, as approved by the District Court, shall be included in the settlement agreement, but that if, prior to the effective date, no such action requiring changes shall have been taken, the petitions will be dismissed.

These provisions were not only agreed to, but are essential to protect petitioners against the possibility of failure of the proposed settlement. If the petitions were dismissed as moot upon the mistaken assumption that petitioners had consented thereto, petitioners would be saddled with the burden of the erroneous decision of the Ninth Circuit in the event of failure of the settlement, and, in addition, with the problem whether a stipulated dismissal of the petitions for certiorari would be proper in order

to effect a settlement agreement entered into with class representatives whose authority to act for members of the class is the subject of the petitions.

In brief, the petitions are not in fact moot by reason of the proposed partial settlement, and any determination of the petitions on such ground would unjustly imperil the vital interests of petitioners.

II. The Partial Settlement Agreement Is Not, and Was Specifically Agreed Not to Be Used As, Any Admission or Concession on the Part of the Settling Defendants of Any Liability or Wrongdoing.

At page 28 of their brief in opposition, respondents refer to the provisions in the partial settlement agreement for payment of \$7,750,000 and state: "The indication^{*} is that if defendants truly believed their proclaimed innocence, their appropriate remedy would be to move for summary judgment."

The partial settlement agreement provides:

"2. *Disclaimers.* This settlement and any proceedings taken hereunder shall not in any event be construed as or deemed to be evidence or an admission or concession on the part of the settling defendants or any of them, of any liability or wrongdoing whatsoever, or on the part of the plaintiffs of any lack of merit in their actions. This Settlement Agreement and each of its provisions shall not be offered or received in evidence in these Consolidated Class Actions or any other action or proceeding as an admission or concession of liability or wrongdoing of any nature on the part of the settling defendants or any of them or as any admission or concession on the part of plaintiffs. The settling defendants specifically disclaim and deny any liability or wrongdoing whatsoever with respect to all the allegations contained in the complaints in these Consolidated Class Actions, including without limitation, those relating to alleged violations of the Securities Exchange Act of 1934."

In brief, the partial settlement agreement is *not* evidence of defendants' lack of innocence. On the contrary, the partial settlement agreement was entered into by the settling defendants in the best interests of Ampex to avoid the consequences to Ampex of the erroneous decision of the Ninth Circuit Court of Appeals which we seek to have reviewed. Those consequences could be disastrous to Ampex quite apart from the merits of plaintiffs' claims, for the reasons stated in our petition for certiorari.

We therefore respectfully pray the Court *not* to determine the petitions for certiorari on the ground that they are moot by reason of the proposed partial settlement, which they are definitely not.

Dated: June 17, 1976.

Respectfully submitted,

ARTHUR R. ALBRECHT
ROBERT C. BARRETT
MCCUTCHEN, DOYLE, BROWN &
ENERSEN

Attorneys for Petitioners William Blackie, Robert E. Brooker, Richard J. Elkus, Arthur H. Hausman, Henry A. McMicking, Nathan W. Pearson, A. E. Ponting, Frederick Seitz, and Irving Trust Company, as Executor of the Estate of H. S. M. Burns, Deceased

THEODORE P. LAMBROS
Attorney for Petitioner Ampex Corporation

(Appendices follow)

Excerpts from the Agreement for the Proposed Partial Settlement

Appendix A

"3. Petitions for a Writ of Certiorari.

"(a) The settling defendants have filed in the United States Supreme Court two separate Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, and the nonsettling defendant has also filed a Petition for a Writ of Certiorari. If and when the effective date hereof shall have occurred, this Settlement Agreement shall be binding between the parties hereto according to its terms, which shall include any revisions or amendments hereto, as approved by the District Court, which are necessitated by any action, if any, by the Supreme Court with respect to said petitions for certiorari theretofore taken. If prior to the effective date hereof, the Supreme Court shall not have granted any of said petitions, reversed, remanded or otherwise taken any action with respect thereto, other than dismissing them or merely postponing them for consideration, which might affect the status of the decision of the Ninth Circuit Court of Appeals herein as the law of the case, the petitions for certiorari of settling defendants will be dismissed.

"(b) The parties to this Settlement Agreement understand that counsel for plaintiffs may wish to seek extensions of time within which plaintiffs must file a response to the aforesaid petitions, and settling defendants will not oppose such extensions. It is agreed that no representation will be made to the Supreme Court that there has been a settlement agreement with the settling defendants unless the agreement has been executed by the settling parties in final form and that any such representation shall advise the Supreme Court fully and fairly of the provisions in the settlement concerning the petitions for certiorari."

Appendix B

"1. *Definitions.* As used herein, the following terms shall have the following meanings:

* * *

"(1) 'Effective date' means: (a) thirty-one days after the entry of the judgment as provided for below in paragraph 11 approving this Settlement Agreement and dismissing with prejudice and on the merits the actions against settling defendants brought by the plaintiffs (as defined in paragraph 1(n) hereof), if the judgment be final on that date, or (b) if appeal time shall be extended or if appeal be taken, the date when such judgment is final and upon which it is no longer subject to judicial review."

Appendix C

"12. *Disapproval of the Settlement.*

"(a) If the Court does not approve this settlement after the hearing . . ., this Settlement Agreement and all other agreements, papers, and documents relating thereto and all orders entered in connection therewith shall . . . thereupon become null and void in all respects without further act by any party hereto. . . ."

Appendix D

"8. *Election To Be Excluded From the Class*

* * *

"(b) If persons electing to be excluded from the class who have aggregate or individual Gross Losses (as calculated in accordance with the provisions of subparagraph 8(c) below and determined from the information set forth in or obtained in connection with requests for exclusion), which losses in dollar

amount exceed amounts separately stipulated among counsel for the parties hereto, then this Settlement Agreement may be cancelled and terminated at the option of the undersigned defendants in accordance with a separate agreement among them and by telephone notice and letter by McCutchen, Doyle, Brown & Enersen to the Court and all signatories hereto, provided that such telephone notice shall be given not later than seventy-two (72) hours preceding the date finally set, by adjournment or otherwise, for the hearing on the settlement, as referred to in subparagraph 9(a)(2) below. The amounts referred to in this subparagraph shall be set forth in said separate agreement, which shall be sealed and filed with the Court together with this Settlement Agreement. Upon giving such notice to all parties hereto and the Court, this Settlement Agreement and all orders entered in connection therewith shall, subject to subparagraph 12(b) below, become null and void in all respects without further act by any party hereto."

Appendix E

"5. *Settlement Fund.* In full and final settlement and discharge of all claims, which have been or might be asserted arising out of or relating to the matters set forth in the complaints herein, including any possible derivative claims, against each of the settling defendants, their predecessors, successors, personal representatives, heirs, assigns and present or former officers, directors, employees and attorneys or other Ampex agents (expressly excluding defendant Touche Ross & Co. and its present and former partners, principals, employees and agents), the settling defendants, within 20 days of the execution of this agreement, shall deposit \$125,000 in cash in a special account with The Philadelphia National Bank in the names of David Berger, P.A., lead counsel for plaintiffs, and McCutchen, Doyle, Brown & Enersen, lead counsel for settling defendants, and shall furnish to said

lead counsel for plaintiffs evidence of one or more irrevocable letters of credit, payment bonds or acceptable equivalent thereof in the aggregate amount of \$2,125,000 to secure the payment of the further deposit of \$2,125,000 as provided below and an assignment without recourse by Ampex of an unsecured agreement of Lloyd's of London to pay Ampex \$5,500,000 within 10 days after the effective date hereof. Within 10 days after the effective date hereof, the settling defendants shall deposit \$2,125,000 in said special account; and Ampex as assignor and said lead counsel for plaintiffs as assignee shall demand that Lloyd's of London pay said unsecured obligation of \$5,500,000 by depositing said sum in said special account. None of the settling defendants guarantees the unsecured agreement of Lloyd's of London to pay \$5,500,000 within 10 days after the effective date hereof, but if said sum is not paid within 10 days after the effective date hereof, then plaintiffs' lead counsel at their option may elect to terminate this agreement by giving written notice of such election to the court and all signatories hereto . . ."